ARKANSAS SUPREME COURT

No. CR 06-423

NOT DESIGNATED FOR PUBLICATION	**Opinion Delivered** **December 7, 2006**
ANSEL RAY POLLARD Appellant	APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY, CR 2005-303, HON. WILLIAM A. STOREY, JUDGE
v.	
STATE OF ARKANSAS Appellee	AFFIRMED.

PER CURIAM

Ansel Ray Pollard entered a plea of guilty to three counts of second-degree sexual assault, a Class B felony, related to three different victims. He was sentenced to 240 months' imprisonment on each charge, with two of the sentences to run concurrently and the third to run consecutively, for an aggregate sentence of 480 months' imprisonment. As part of the plea bargain accepted by appellant, the State did not prosecute appellant on a separate charge of rape with a person who is less than 14 years of age, a Class Y felony.

Subsequently, appellant filed in a trial court a timely *pro se* petition for postconviction relief pursuant Ark. R. Crim. P. 37.1.[1] After a hearing, the trial court denied the petition. Appellant, now represented by counsel, brings this appeal of the trial court's order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly

[1]Although appellant did have the assistance of an attorney in preparing the Rule 37.1 petition filed in the trial court, the attorney did not sign the pleading or enter an appearance in the matter. A different attorney represents appellant on appeal.

erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

The charges against appellant arose from allegations by three juvenile females that he sexually fondled them. Before finally entering the plea of guilty, appellant agreed to accept the plea bargain offered by the State approximately six or seven times, and then withdrew his acceptance each time and insisted upon having a jury trial. Prior to the scheduled jury trial, the prosecutor handling this matter, Mr. Duell, was able to locate two additional witnesses who may have been able to testify under the pedophile exception of Ark. R. Evi. 404(b)[2] that appellant also sexually assaulted them. He notified appellant's primary counsel, Mr. Smith, about the these witnesses, and Mr. Smith later gave appellant this information.

On May 24, 2005, the day before the jury trial was scheduled to begin, Mr. Smith was notified by Mr. Duell that the police in Crawford County wanted to talk to appellant regarding the 1995 Morgan Nick kidnapping, which remains unsolved.[3] Mr. Smith related this information to appellant. On that day, appellant agreed to enter a guilty plea and did so after 5 p.m., thereby canceling the jury trial. The judgment and commitment order was entered on May 25, 2005, at 2:52

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[2]When a criminal charge concerns the sexual abuse of a child, evidence of other crimes, wrongs, or acts, such as sexual abuse of that child or other children, is admissible to show motive, intent, or plan. *Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996).

[3]Mr. Duell explained at the Rule 37.1 hearing that in his search for additional victims of appellant, he contacted investigators in Crawford County. In doing so, he notified the investigators that appellant had been living near Crawford County around the time of the Morgan Nick kidnapping, and that he had been charged with sex-related crimes. These factors triggered the investigators' interest in interviewing appellant.

p.m.

In his first claim of error, appellant maintains that the trial court erred in finding that his plea of guilty was not coerced and in finding that he entered into the plea agreement voluntarily. At the postconviction hearing, appellant and his wife testified that they had been informed, in connection with the Nick case, that a warrant had been issued for appellant's arrest and that Crawford County had evidence connecting appellant with that case. Thus, appellant claims that he was coerced into accepting the State's offer to avoid involving his wife in the potential publicity expected to surround his connection to the Nick matter. This coercion resulted in appellant's involuntarily entering the plea of guilty.

Both Mr. Duell and Mr. Smith disputed the claims of appellant and Mrs. Pollard, testifying that neither man had made such statements to one another or to the Pollards. Additionally, Mr. Smith testified that he did not inform appellant of Crawford County's interest in questioning appellant until after appellant agreed to accept the plea agreement. Testimony from Mr. Smith and Mr. Dodson, another attorney in Mr. Smith's firm, indicated that appellant stated that he had no concerns about being connected to Morgan Nick's disappearance.[4]

The trial court found that appellant failed to meet his burden in the matter as he did not prove that he agreed to enter a guilty plea as a result of coercion or that he did not voluntarily enter the plea. The trial judge is not required to believe the testimony of any witness, particularly that of the

[4]Mr. Dodson, an associate in Mr. Smith's law firm, was assisting in preparation for trial, but had little other involvement in the case. Testimony at the Rule 37.1 hearing indicated that Mr. Smith began representing appellant at least eight or ten months before charges were filed against him. Mr. Smith testified that he represented appellant at the time that the Washington County prosecutor's office issued a warrant for appellant's arrest in connection with the instant matter and that he contacted Mrs. Pollard in order to locate appellant.

accused since he or she is the person most interested in the outcome of the proceedings. *Bunch v. State*, 346 Ark. 33, 57 S.W.3d 124 (2001). Where there is conflicting evidence, the issue becomes one of credibility to be determined by the trial court. *Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999).

Here, the testimony of Mr. Smith and Mr. Duell contradicted the testimony of appellant and Mrs. Pollard. The trial court apparently did not find the testimony of appellant and his wife to be credible as to whether appellant was coerced to enter a plea of guilty based on a potential association to the Morgan Nick case. Further, the trial court apparently did not find the testimony of appellant or his wife to be credible as to whether appellant did not voluntarily enter his guilty plea. In addition, the transcript from the plea hearing, along with the paperwork completed by appellant in accepting the plea bargain, indicated that appellant entered into the plea agreement intelligently and voluntarily. We cannot say the trial court's findings were clearly erroneous on this point.

Next, appellant claims that the trial court erred in finding that appellant failed to meet his burden of proving that he timely attempted to withdraw his plea. Specifically, appellant alleges that he requested that Mr. Smith withdraw his guilty plea before it had been entered. He complains that trial counsel incorrectly informed him that it was too late to withdraw his plea and failed to seek withdrawal of the plea before the judgment was entered, thus rendering ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). There is a strong presumption

that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State,* 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, appellant must show that there is a reasonable probability that the decision reached would have been different absent the errors. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.*

In the instant matter, appellant contacted Mr. Smith the night that his guilty plea was accepted by the trial court. However, Mr. Smith denied that appellant sought to withdraw his guilty plea. Instead, Mr. Smith testified at the hearing that appellant was upset that a television station reported that he had entered a plea of guilty to rape, rather than to sexual assault. According to Mr. Smith, appellant wished to sue the television station or force it to correctly report the charges to which appellant entered a plea of guilty. Mr. Smith also explained at the Rule 37.1 hearing that he reassured appellant that he had entered a plea of guilty to sexual assault and not rape. While appellant testified that he insisted that the guilty plea be withdrawn, and was told that it was too late for such an action, Mr. Smith stated that appellant did not make such a request either before or after entry of the judgment and commitment order.

As noted above, credibility of witnesses, especially in light of conflicting evidence, is a matter to be determined by the trial court. *Rankin*, *supra*. Here, the trial court found that appellant failed to meet his burden of proof by failing to demonstrate that he timely attempted to withdraw his guilty plea. The trial court is not required to believe the testimony of any witness, particularly the accused. *Bunch*, *supra*. The trial court presumably believed the testimony of Mr. Smith and determined that appellant did not request Mr. Smith to withdraw of his guilty plea. Thus, appellant failed to show that trial counsel's representation fell below an objective standard of reasonableness

or that he rendered ineffective assistance to appellant.

Appellant's last argument on appeal is that the trial court erred when it refused to disqualify the entire Washington County Prosecuting Attorney's office from representing the State of Arkansas in the Rule 37.1 proceedings below. Appellant sought disqualification of the prosecutor's office as Mr. Duell would be a witness for the State, and appellant claimed that Mr. Duell intentionally used appellant's potential connection to the Morgan Nick case to coerce appellant into accepting the plea agreement offer. The trial court denied the motion.

This court reviews a trial court's decision to disqualify an attorney under an abuse-of-discretion standard. *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003) (citing *Wilburn v. State*, 346 Ark. 137, 56 S.W.3d 365 (2001)). Abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but requires that the trial court act improvidently, thoughtlessly, or without due consideration. *Grant v. State*, 357 Ark. 91, 161 S.W.3d 785 (2004); *O'Neal v. State*, 356 Ark. 674, 158 S.W.3d 175 (2004). In other words, we determine whether the trial court's decision was arbitrary or groundless. *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991).

Generally, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness[.]" Arkansas Rules of Professional Conduct 3.7(a). With regard to criminal prosecutions, a prosecutor cannot serve as an advocate for the State when he undertakes an active role in the investigation such that he becomes a potentially material witness either for the State or defense during the trial on the criminal charges. *Chelette v. State*, 308 Ark. 364, 824 S.W.2d 383 (1992); *see also Duncan v. State*, 291 Ark. 521, 726 S.W.2d 653 (1987) (this court refused to require automatic disqualification of an entire prosecuting attorney's office when a single prosecutor should

have been disqualified from testifying at the criminal trial, citing *Ford v. State*, 4 Ark.App. 135, 628 S.W.2d 340 (1982)).

Appellant cites Arkansas Rule of Professional Conduct 3.7(a) for the general proposition that Mr. Duell "could not be an attorney in the Rule 37 proceeding[.]" From that starting point, appellant then maintains that the entire Washington County prosecutor's office should be disqualified from handling the Rule 37.1 petition, citing Professional Conduct Rule 1.10.[5] He argues that to allow the prosecutor's office to handle this matter creates a conflict of interest and violates appellant's right to due process.

Initially, we note that Rule 3.7(a) has no bearing on this matter because Mr. Duell did not represent the State in the Rule 37.1 petition. Instead, another attorney in his office, with no prior connection to the case, handled the postconviction case.

Moreover, neither Rule 1.10 nor any of the cases cited by appellant addresses situations involving a criminal postconviction matter or a collateral attack of a valid judgment. Appellant failed to show how appellant suffered any prejudice by the prosecutor's office's defense of the postconviction petition, how a conflict of interest existed in the context of a postconviction matter that stemed from a duty to the criminal petitioner, or how the purpose of the Professional Conduct Rules would be advanced with regard to client loyalty or protection of confidential information by the disqualification appellant sought.

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[5]Rule 1.10(a) states:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.9 or 3.7, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm[.]

From a practical standpoint, should the Washington County prosecutor's office be disqualified, and a special prosecutor be appointed, no different situation would exist from the present situation – Mr. Duell would still be a necessary witness as appellant's allegations involve him personally.

We cannot say that the trial court acted in an arbitrary or groundless manner when it denied appellant's motion for recusal of the Washington County Prosecutor's Office. Thus, appellant failed to show that the trial court erred on this point.

Affirmed.